

DEC 11 2015

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. EC-14-1550-DJuF
6	CITY OF STOCKTON, CALIFORNIA,)	Bk. No. 12-32118-CMK
7	Debtor.)	
8	<hr/>		
9	FRANKLIN HIGH YIELD TAX-FREE)	
10	INCOME FUND; FRANKLIN)	
11	CALIFORNIA HIGH YIELD)	
12	MUNICIPAL FUND,)	
13	Appellants,)	
14	v.)	OPINION
15	CITY OF STOCKTON, CALIFORNIA,)	
16	Appellee.)	
17	<hr/>		

Argued and submitted on November 19, 2015
at Sacramento, California

Filed - December 11, 2015

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Hon. Christopher M. Klein, Bankruptcy Judge, Presiding

Appearances: James C. Johnston, Jones Day, appeared and argued
on behalf of Appellants Franklin High Yield Tax-
Free Income Fund and Franklin California High
Yield Municipal Fund.

Marc A. Levinson, Orrick, Herrington & Sutcliffe
LLP, appeared and argued on behalf of the Appellee
City of Stockton, California.

Before: DUNN, JURY AND FARIS, Bankruptcy Judges.

1 DUNN, Bankruptcy Judge:

2
3 Franklin High Yield Tax-Free Income Fund and Franklin
4 California High Yield Municipal Fund (collectively, "Franklin")
5 appeal the bankruptcy court's order ("Confirmation Order")
6 confirming the City of Stockton, California's ("City") first
7 amended plan of adjustment ("Plan") in chapter 9.¹ We DISMISS,
8 as equitably moot, Franklin's appeal of the Confirmation Order
9 generally and otherwise AFFIRM the Confirmation Order's treatment
10 of Franklin's general unsecured claim under the Plan.

11 **I. FACTUAL BACKGROUND²**

12 A. Events prior to bankruptcy

13 The financial problems that drove the City to seek chapter 9
14 relief did not arise overnight. The City was an epicenter of the
15 subprime mortgage default crisis that arose in conjunction with
16

17
18 ¹ Unless otherwise indicated, all chapter and section
19 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
20 all "Rule" references are to the Federal Rules of Bankruptcy
21 Procedure, Rules 1001-9037.

22 ² Historical background facts are taken primarily from the
23 City's modified disclosure statement, filed on November 21, 2013
24 ("Disclosure Statement"), and the bankruptcy court's published
25 opinion on the City's eligibility for chapter 9 relief in In re
26 City of Stockton, California, 493 B.R. 772 (Bankr. E.D. Cal.
27 2013). Franklin only included portions of the Disclosure
28 Statement in their excerpts of record. We have exercised our
discretion to review the entire Disclosure Statement and certain
other documents in the electronic record of the City's main
chapter 9 case. See O'Rourke v. Seaboard Sur. Co. (In re E.R.
Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v.
Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9
(9th Cir. BAP 2003).

1 the recession that began in 2007-08. During this period, real
2 estate values, both commercial and residential, in the City
3 declined by around 50%, and unemployment grew to about 22%. The
4 median home price in the City dropped from \$397,000 in 2006 to
5 \$109,000 in 2012, a decline of 72%. Disclosure Statement, at 17.
6 The City had one of the highest foreclosure rates in the country.
7 Consequently, property tax, sales tax and other public revenues
8 declined precipitously.

9 Two self-inflicted factors worked to exacerbate
10 significantly the City's financial problems: 1) As noted by the
11 bankruptcy court,

12 In better times, [the City] committed its general fund
13 to back long-term bonds to finance development projects
14 based on an overly-sanguine "if-you-build-it-they-will-
15 come" mentality. They did not come. Hence project
16 revenues were insufficient to pay project bills.

17 City of Stockton, 493 B.R. at 779.

18 2) In addition, the City had a history of compensating its
19 employees at above-market levels.

20 Among other things, the City paid for generous health
21 care benefits to which employees did not contribute,
22 including lifetime health care regardless of length of
23 service. It permitted, to an unusual degree, so-called
24 "add-pays" for tasks that allowed nominal salaries to
25 be increased to totals greater than those prevailing
26 for other municipalities. And there were pre-
27 determined automatic annual cost-of-living pay
28 increases not tied to the state of the economy or local
finances. . . . Pensions were allowed to be based on
the final year of compensation, which compensation
could include essentially-unlimited accrued vacation
and sick leave. This led to a phenomenon of so-called
"pension-spiking" in which a pension could be
substantially greater than the retiree's actual final
salary. Nor were individual employees required to
contribute to their pensions.

29 Id.

30 The City's financial problems were obscured by faulty

1 management and accounting practices. "City accounts were in such
2 disarray that it has taken literally years to unscramble them."
3 Id. However, ultimately, the City's fiscal excesses,
4 particularly in light of the recession, proved unsustainable.

5 Beginning in 2008, the City declared a series of financial
6 emergencies and took certain unilateral actions to try to get its
7 fiscal house in order. The City reduced its work force "by 25%
8 from 1,886 on July 1, 2008 to 1,420 on December 31, 2011." Id.
9 at 780. "[S]worn police officers were cut by 25%, non-sworn
10 police staffing by 20%, fire staffing by 30%, and non-safety
11 staffing by 43%." Disclosure Statement, at 9. Compensation to
12 City employees was reduced by \$52 million, and staffing and
13 service levels were cut by \$38 million, "for an overall General
14 Fund budget reduction of approximately \$90 million during fiscal
15 years 2009-10, 2010-11, and 2012-13." Id. Unfortunately, these
16 actions were not enough to solve the City's fiscal problems.

17 As of June 30, 2012, the City's general fund budget for the
18 2012-13 fiscal year was projected to be \$25.9 million under
19 water, with funding potentially not available to cover July 2012
20 payroll, unless drastic action was taken. Id. Accordingly, the
21 City Manager and Stockton's City Council took steps to initiate
22 the neutral evaluation process under California Government Code
23 ("Cal. Gov. Code") § 53760 as a prelude to a chapter 9 filing.
24 City of Stockton, 493 B.R. at 780-81.

25 Former bankruptcy judge Ralph Mabey was selected as the
26 neutral evaluator. Thereafter, the neutral evaluation process
27 continued for ninety days, as authorized by Cal. Gov. Code
28 § 53760.3(r), and some positive results were achieved: Agreements

1 were negotiated to adjust all unexpired collective bargaining
2 agreements with City employees, and substantial progress was made
3 in negotiations with some other stake holders. Id. at 783.
4 However, no agreements were reached with any capital markets/bond
5 creditors, including Franklin. Id. at 782-83.

6 B. Chapter 9 filing and events prior to confirmation

7 The City filed its petition for relief under chapter 9 on
8 June 28, 2012. From the outset, proceedings in the City's
9 bankruptcy case were contentious. The capital markets/bond
10 creditors contested eligibility, and "only after many months of
11 costly discovery, briefing, legal maneuvering, and ultimately a
12 trial" did the bankruptcy court determine that the City was
13 entitled to relief in chapter 9. The order for relief was
14 entered on April 1, 2013, and the bankruptcy court's opinion
15 stating its findings and conclusions as to the City's eligibility
16 for chapter 9 relief was entered on June 12, 2013. See City of
17 Stockton, 493 B.R. 776-98 (Bankr. E.D. Cal. 2013). The
18 bankruptcy court's eligibility decision was not appealed and is
19 final.

20 In the meantime, the bankruptcy court had appointed Oregon
21 bankruptcy judge Elizabeth L. Perris as mediator on July 12,
22 2012, and negotiations continued between the City and interested
23 parties under her auspices, with the goal of reaching agreement
24 on the terms for a consensual plan of adjustment. These
25 negotiations were protracted and proceeded in fits and starts,
26 but over time, they were largely successful, with definitive
27 settlements reached with the following creditors and creditor
28 groups:

1 1) The Stockton Police Officers' Association - the only
2 labor organization with which the City had not reached agreement
3 prepetition;

4 2) The Official Committee of Retirees - which represented
5 2,100 retirees with pension benefits, of which approximately
6 1,100 also claimed rights to lifetime health benefits ("Retiree
7 Health Benefit Claims");

8 3) California Public Employees' Retirement System
9 ("CalPERS") - which administers the City's pensions;

10 4) Assured Guaranty Corp. and Assured Guaranty Municipal
11 Corp. (collectively, "Assured") - which insured the City's
12 pension bonds;

13 5) National Public Finance Guarantee Corporation ("NPF") -
14 which insured an aggregate of approximately \$93.8 million in 2004
15 and 2006 City bonds, secured in part by parking structures, among
16 other things.

17 6) Ambac Assurance Corporation ("Ambac") - which insured
18 approximately \$13.3 million in 2003 City certificates of
19 participation; and

20 7) Wells Fargo Bank ("Wells Fargo") - which served as the
21 indenture trustee for a number of the City's bond issues.

22 In fact, the only major creditor group with which no
23 settlement was negotiated was Franklin.

24 C. Plan provisions and confirmation proceedings

25 The Plan submitted by the City for confirmation classified
26 claims, incorporating the mediated settlements with creditor
27 constituencies, including the following:

28 1) Claims of CalPERS and pension plan participants (Class 15):

1 The claims of pension plan participants and CalPERS were treated
2 as unimpaired because the City settled with them on the basis
3 that it would remain bound to honor their legal, equitable and
4 contract rights unaltered. (The quid pro quo for the City's
5 settlement was that it would be relieved of liability to pay
6 Retiree Health Benefit Claims, except for \$5,100,000, to be paid
7 as provided for general unsecured claims in Class 12.)

8 2) Claims of Assured (Classes 5 and 6): Assured's claims were
9 treated as impaired, entitling Assured to vote both as Class 5
10 and Class 6. Under the Plan, the City agreed to transfer fee
11 title to its interest in an office building located at 400 E.
12 Main Street in Stockton ("400 E. Main"), its planned replacement
13 for city hall, to Assured in exchange for the extinguishment of
14 the City's obligations under 2007 lease obligation bonds. Lease
15 arrangements with respect to 400 E. Main were to be altered to
16 provide that the City would lease space in 400 E. Main from
17 Assured for eight years at below-market rates, with four one-year
18 options to renew. As part of their settlement, the City and
19 Assured agreed that the City's obligations under pension bonds
20 would be reduced to 52%, but allowed for contingent full
21 repayment of the bond obligations if the City's revenues out-
22 performed certain baseline projections.

23 3) Claims of NCFG (Classes 2, 3 and 4): NCFG's 2004 parking
24 structure bonds were to be paid through a new Parking Authority,
25 to be created by the City, that would take ownership of all
26 downtown Stockton parking facilities. The payment obligation for
27 the bonds would be shifted from the General Fund to the Parking
28 Authority, removing the obligation from the General Fund ledger.

1 NPFPG's 2004 arena-related bonds were secured by both a lease of
2 the arena and a pledge of certain restricted tax revenues. The
3 bonds were to be restructured to provide debt service savings and
4 make it more likely that the restricted tax revenues would be
5 sufficient to service the debt. A ceiling on General Fund
6 liability was negotiated as part of this settlement. Finally,
7 NPFPG's 2006 bonds were secured by a lease on the Stewart
8 Eberhardt Building, which houses the City's departments of Human
9 Resources, 911 Dispatch, Police Investigations and Crime Lab, and
10 Public Works. Because the Stewart Eberhardt Building was
11 constructed to meet California's "essential services" building
12 standards, it would be very expensive to replace. Accordingly,
13 the settlement provided that the obligations of the City under
14 NPFPG's 2006 bonds would not be altered. NPFPG's claims in Classes
15 2, 3 and 4 were treated as impaired.

16 4) Claims of Ambac (Classes 1A and 1B): Ambac's claims were
17 secured by leases of the City's main police station, two fire
18 stations, and a library branch. The Plan did not purport to
19 alter the amounts due to holders of the 2003 City certificates of
20 participation, but the Plan provided for a reduction of the
21 General Fund's liability with respect to Ambac's claims and for
22 future flexibility to extend payments, if necessary, such that
23 Ambac would have rights to vote as "impaired" in both Classes 1A
24 and 1B under the Plan.

25 5) General Unsecured Claims (Class 12): Included in class 12
26 were "Golf Course/Park Unsecured Claim" (Franklin's unsecured
27 claim); Retiree Health Benefit Claims; Leave Buyout Claims; the
28 claim filed by Michael A. Cobb; and miscellaneous Other

1 Postpetition Claims and General Unsecured Claims. The mediated
2 agreement with the Official Committee of Retirees provided that
3 the Retiree Health Benefit Claimants would receive an aggregate
4 payment of \$5,100,000 in full satisfaction of their allowed
5 claims. All other creditors in Class 12 would receive a
6 percentage of the allowed amounts of their respective claims
7 equal to the percentage that the Retiree Health Benefit Claimants
8 would recover (based on the \$5,100,000 payment).

9 As noted above, the City did not reach a settlement with
10 Franklin, but the City offered Franklin the opportunity to share
11 pro rata in contingent funds promised to Assured if a deal could
12 be made with respect to treatment of Franklin's claims.

13 Franklin objected to confirmation of the Plan. Following
14 extensive pre-hearing briefing by the parties, the bankruptcy
15 court conducted a five-day trial of confirmation issues. At the
16 same time, the bankruptcy court heard evidence to determine the
17 amount of Franklin's secured claim in a pending adversary
18 proceeding. The bankruptcy court received and considered
19 multiple post-hearing submissions and heard a day of post-hearing
20 argument.

21 At a hearing on July 8, 2014, the bankruptcy court announced
22 its findings as to the value of Franklin's collateral, consisting
23 of two golf courses, a community center associated with one of
24 the golf courses, and an ice skating rink. The bankruptcy court
25 found the aggregate value of Franklin's security to be
26 \$4,052,000. Franklin has not appealed that finding. Thereafter,
27 the City amended the Plan to provide for treatment of Franklin's
28 secured claim as Class 20, specifying that Franklin's allowed

1 secured claim in the amount of \$4,052,000 would be paid in full
2 on the effective date of the Plan.

3 At a hearing ("Hearing") on October 30, 2014, the bankruptcy
4 court stated orally on the record its findings and conclusions
5 with respect to confirmation of the Plan. The first thing the
6 bankruptcy court did was incorporate the findings and conclusions
7 from its eligibility determination. See City of Stockton, 493
8 B.R. at 776-98. It noted the outstanding objections to
9 confirmation from Franklin, focusing on Franklin's challenges to
10 the City's good faith in proposing the Plan and its argument that
11 its claim should be separately classified from the general
12 unsecured class. The bankruptcy court further noted that one of
13 the requirements for implementation of the Plan was that the
14 City's voters approve a tax increase to fund Plan obligations,
15 and the City's voters had done so.

16 The bankruptcy court quoted § 1122(a)'s requirement that,
17 "[A] plan may place a claim or an interest in a particular class
18 only if such claim or interest is substantially similar to the
19 other claims or interests of such class." It then observed that
20 bond claims, other than Franklin's, were all separately
21 classified, "and that's appropriate because each one has its own
22 legal rights and status."

23 The bankruptcy court noted that § 1123(a)(4) "requires that
24 there be the same treatment of each claim or interest of a
25 particular class unless the holder of a claim or interest agrees
26 to less favorable treatment." It then stated that it had
27 examined the treatment of all of the classes of claims in the
28 Plan, with particular focus on Class 12's treatment of general

1 unsecured claims, and found "there is equal treatment with
2 respect to all of the claims that are general unsecured claims."
3 Accordingly, it concluded that the requirements of § 1123(a)(4)
4 had been satisfied. In addition, later on during the Hearing,
5 the bankruptcy court determined the aggregate amount of the
6 Retiree Health Benefit Claims to be \$545 million.

7 The bankruptcy court further noted § 1129(a)(3)'s
8 requirement that "the Plan must have been proposed in good faith
9 and not by any means forbidden by law." It considered Franklin's
10 objection that it was unfairly discriminatory to treat Franklin's
11 unsecured claim as provided for in Class 12 while not altering
12 the treatment of the City's pension obligations. However, it
13 rejected Franklin's argument.

14 The general reduction in compensation has an indirect
15 effect on pensions. The reduction in . . . number of
16 employees has a significant effect to pensions. There
17 are fewer people entitled to pensions in the first
18 place. Also, the City has a plan for new employees in
19 which pensions are less generous than the existing
20 pensions, and those have all been approved and signed
21 off in the collective bargaining agreements.

22 Hr'g Tr. Oct. 30, 2014, at 35:9-16. In addition, the bankruptcy
23 court pointed out that, "[O]ne of the features of the agreements
24 with other capital market creditors is a contingent fund that is
25 available in a number of years down the Plan that is designed to
26 provide for additional payment if the finances of the City
27 prosper and that . . . more than 20 percent of that was reserved
28 for Franklin Funds if it wished to take advantage of it before
the time of confirmation," but Franklin elected not to accept
that option. Id. at 36:13-20. Based on those findings, the
bankruptcy court concluded that the Plan had been proposed in

1 good faith and not by any means forbidden by law.

2 The bankruptcy court, after reiterating its understanding
3 that Franklin had challenged the classification of its unsecured
4 claim under the Plan, noted that all impaired classes had voted
5 to accept the Plan, and, thus, the requirements of §§ 1129(a)(8)
6 and 1129(a)(10) were satisfied.³

7 The bankruptcy court then moved on to consider whether the
8 requirements for confirmation of a plan of adjustment in chapter
9 9 under § 943(b) were satisfied and so found. In particular, it
10 found that “[a]ll amounts to be paid by the debtor or any person
11 for services or expenses in the case or incident to the Plan have
12 been fully disclosed and are reasonable.” Accordingly, the
13 requirements of § 943(b)(3) were satisfied.

14 The bankruptcy court further found that, in light of the
15 City voters’ approval of the sales tax increase necessary to fund
16 the Plan, the requirements of § 943(b)(6) were satisfied.

17 Finally, the bankruptcy court considered § 943(b)(7), which
18 requires that the Plan be in the best interests of creditors and
19 be feasible. It noted that the “best interests” test in chapter
20 9 is necessarily different from the test in chapter 11, which
21 requires that creditors receive at least as much as they would
22 receive in a chapter 7 liquidation. “[I]t goes without saying

23
24 ³ Toward the end of the hearing, counsel for the City
25 pointed out that one impaired class, Class 14, tort claimants
26 against the City, had voted in favor of the Plan in terms of the
27 majority in amount required under the Bankruptcy Code, but not in
28 number. The bankruptcy court did not make further findings with
respect to Class 14 at the Hearing, but as no member of Class 14
has appealed the Confirmation Order, we do not consider this
matter further.

1 that a municipality cannot be liquidated, so it's kind of hard to
2 figure out what a hypothetical liquidation would be." Hr'g Tr.
3 Oct. 30, 2014, at 40: 20-23.

4 Having considered carefully the provisions of the Plan and
5 available alternatives, including starting over to construct a
6 new chapter 9 plan at great additional cost, the bankruptcy court
7 found that the Plan was "the best that can be done in terms of
8 the restructuring and adjustments of the debts of the City" and
9 concluded that the requirements of § 943(b)(7) were satisfied.
10 Accordingly, the Plan would be confirmed.

11 Franklin filed a motion to alter or amend findings of fact
12 and conclusions of law ("Motion to Amend Findings"), arguing that
13 the Retiree Health Benefit Claims should be discounted to present
14 value, which would reduce those claims below the \$545 million
15 amount found by the bankruptcy court at the Hearing. The
16 bankruptcy court addressed the Motion to Amend Findings at a
17 hearing on December 10, 2014. It first noted that no
18 objection(s) had been filed to the Retiree Health Benefit Claims,
19 and accordingly, under § 925, they were deemed allowed. It then
20 noted that, even if it discounted the Retiree Health Benefit
21 Claims to present value, the lowest aggregate amount argued for
22 the claims was \$261.9 million, as advocated by Franklin, and
23 using that number would not change the Class 12 voting outcome
24 for the Plan.

25 The bankruptcy court then discussed the parties'
26 presentations as to appropriate discount rates, and after
27 analyzing their presentations and applicable authorities,
28 including § 502, it characterized the Retiree Health Benefit

1 Claims as an entirely unfunded benefit as of the filing date and
2 determined that it was not required to discount the Retiree
3 Health Benefit Claims to present value. Accordingly, the
4 bankruptcy court denied the Motion to Amend Findings.

5 Franklin filed a notice of appeal and a motion for stay
6 pending appeal ("Stay Motion"). After hearing argument from the
7 parties, the bankruptcy court announced its decision on the Stay
8 Motion at a hearing on January 20, 2015. Noting that the City's
9 chapter 9 case had unfolded over a period of two and a half
10 years, the bankruptcy court went over its rationale for
11 confirming the Plan, enunciated in greater detail in its oral
12 findings and conclusions at the Hearing. It then addressed the
13 standards for the imposition of a stay pending appeal.

14 In light of the history of the case, the issues raised, and
15 the relatively deferential standard of review as to its fact
16 findings, the bankruptcy court concluded that Franklin's
17 likelihood of success on the merits on appeal was low. Noting
18 that Franklin's counsel stated in argument that "only money" was
19 at issue, and "I'm confident that the City is going to be around,
20 and it's still going to have the citizenry of a couple hundred
21 thousand people," the bankruptcy court did not see how
22 significant or irreparable harm would come to Franklin in the
23 absence of a stay. On the other hand, it found that imposing a
24 stay pending appeal would impose substantial harm on the City and
25 its other creditors, including retirees. Finally,

26 there is the public interest. And, of course,
27 municipal insolvency is a very complicated issue of
28 great public interest, and the estate and municipality
and just the overall system, capital market system,
really are served by some definitive resolution of

1 cases so that people understand the rules of the game
2 and know exactly what they're facing. . . . [T]he
3 public interest is served by actually being able to
4 implement a plan on which people can rely.

5 Hr'g Tr. Jan. 20, 2015, at 23:2-8 and 16-18. Accordingly, the
6 public interest militated against imposing a stay.

7 Based on these findings and conclusions, the bankruptcy
8 court denied the Motion for Stay.

9 On February 27, 2015, the bankruptcy court issued an
10 "Amended Opinion Regarding Confirmation and Status of CalPERS"
11 ("Amended Opinion"), supplementing its oral findings and
12 conclusions at the Hearing. One of the purposes of the Amended
13 Opinion was to clarify the status and amounts of Franklin's
14 secured and unsecured claims:

15 Franklin's unsecured claim is \$30,480,190.00. The
16 judicially-determined secured claim is \$4,052,000.00,
17 which is being paid in full. And, Franklin receives
18 \$2,071,435.15 from a "Reserve Fund" funded by bond
19 proceeds and held by the indenture trustee under
20 section 5.05 of the bond indenture. While the parties
21 differ about how to characterize the Reserve Fund, they
22 agree that Franklin ends up with \$6,123,435.15 (secured
23 claim + Reserve Fund), plus nearly 1% on its
24 \$30,480,190.00 unsecured claim. Hence, Franklin's
25 total recovery from all sources is about 17.5% (not
26 12%).

27 Amended Opinion, at 1 n.1. Otherwise, the Amended Opinion
28 focused on Franklin's objection argument that the City's pensions
could be modified and, in light of that premise, the Plan should
not be confirmed if they were not modified - a premise that the
bankruptcy court ultimately rejected. The bankruptcy court
reinforced its findings that City employees and retirees, the
beneficiaries of the City's pension plans, "shared the pain" with
the capital markets/bond creditors. It reiterated that the City

1 terminated its lifetime retiree health benefits program through
2 the Plan and that City pension liabilities were indirectly but
3 substantially reduced "as a result of curtailed pay and curtailed
4 future pay increases in the renegotiated collective bargaining
5 agreements." Amended Opinion, at 51. To fund the Plan, City
6 voters "approved a sales tax increase in the greatest amount and
7 for the longest period permitted by California law." Id. at 53.
8 The bankruptcy court restated its conclusions that the standards
9 for confirmation of the Plan in chapter 9 had been met and that
10 the Plan would be confirmed.

11 On the same day, the bankruptcy court entered the
12 Confirmation Order. Franklin's previously filed notice of appeal
13 is deemed timely under Rule 8002(a)(2).

14 During the briefing in this appeal, the City filed a motion
15 to dismiss the appeal as equitably moot ("Motion to Dismiss").
16 Franklin filed an opposition to the Motion to Dismiss, to which
17 the City replied. By order entered on October 14, 2015, the
18 Motion to Dismiss was taken under advisement and referred to this
19 panel for decision in conjunction with its disposition of the
20 appeal.

21 **II. JURISDICTION**

22 The bankruptcy court had jurisdiction under 28 U.S.C.
23 §§ 1334 and 157(b)(2)(A), (B) and (L). Except as otherwise
24 stated below, we have jurisdiction under 28 U.S.C. § 158.

25 **III. ISSUES**

26 1. Is this appeal equitably moot insofar as Franklin seeks
27 reversal of confirmation of the Plan?

28 2. Is it possible to provide a remedy to Franklin in terms

1 of increasing the payout on its unsecured claim under the Plan?

2 3. Did the bankruptcy court err in concluding that the Plan
3 was "proposed in good faith" for purposes of § 1129(a)(3)?

4 4. Did the bankruptcy court err in concluding that the
5 classification of Franklin's unsecured claim was not "unfairly
6 discriminatory" for purposes of §§ 1122(a) and 1123(a)(4)?

7 5. Did the bankruptcy court err in concluding that the Plan
8 satisfied the "best interests of creditors" test in § 943(b)(7)?

9 6. Did the bankruptcy court err in concluding that it was
10 not required to discount the Retiree Health Benefit Claims to
11 present value?

12 IV. STANDARDS OF REVIEW

13 We review our own jurisdiction, including questions of
14 equitable mootness, de novo. Ellis v. Yu (In re Ellis), 523 B.R.
15 673, 677 (9th Cir. BAP 2014). We review the bankruptcy court's
16 decision to confirm the Plan for an abuse of discretion.

17 Marshall v. Marshall (In re Marshall), 721 F.3d 1032, 1045 (9th
18 Cir. 2013); Computer Task Group, Inc. v. Brotby (In re Brotby),
19 303 B.R. 177, 184 (9th Cir. BAP 2003) ("The ultimate decision to
20 confirm a reorganization plan is reviewed for an abuse of
21 discretion."). We review the bankruptcy court's findings of fact
22 for clear error and its conclusions of law de novo. Bronitsky v.
23 Bea (In re Bea), 533 B.R. 283, 285 (9th Cir. BAP 2015). De novo
24 means that we review a matter anew, as if no decision previously
25 had been rendered. Dawson v. Marshall, 561 F.3d 930, 933 (9th
26 Cir. 2009).

27 We must affirm the bankruptcy court's fact findings unless
28 we determine that those findings are "(1) 'illogical,'

1 (2) 'implausible,' or (3) without 'support in inferences that may
2 be drawn from the facts in the record.'" United States v.
3 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

4 A bankruptcy court abuses its discretion if it applies an
5 incorrect legal standard or misapplies the correct legal
6 standard, or if its fact findings are illogical, implausible or
7 not supported by evidence in the record. TrafficSchool.com, Inc.
8 v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

9 We may affirm the decision of the bankruptcy court on any
10 basis supported by the record. See ASARCO, LLC v. Union Pac.
11 Co., 765 F.3d 999, 1004 (9th Cir. 2014); Shanks v. Dressel, 540
12 F.3d 1082, 1086 (9th Cir. 2008).

13 V. DISCUSSION

14 A. Equitable mootness

15 In the Motion to Dismiss, the City argues that we should
16 dismiss Franklin's appeal as equitably moot. Franklin initially
17 responds that we should not even consider the Motion to Dismiss
18 for two reasons that we address in turn.

19 1. Waiver

20 First, Franklin argues that the City waived its equitable
21 mootness argument because it could and should have raised it
22 earlier. In support of its argument, it cites familiar authority
23 to the effect that an argument not made in a party's opening
24 brief is deemed waived. See, e.g., Miller v. Fairchild Indus.,
25 Inc., 797 F.2d 727, 738 (9th Cir. 1986) ("The Court of Appeals
26 will not ordinarily consider matters on appeal that are not
27 specifically and distinctly argued in the [party's] opening
28 brief.").

1 The City responds that it properly raised the equitable
2 mootness issue by motion. See Rule 8013(a)(1) (“A request for an
3 order or other relief is made by filing a motion”); Ninth
4 Circuit Rule 27-11; Rev Op Group v. ML Manager LLC (In re
5 Mortgages Ltd.) (“Mortgages I”), 771 F.3d 1211, 1214 (9th Cir.
6 2014) (“ML Manager is also entitled to move to dismiss in this
7 court based on equitable mootness, regardless of the decisions of
8 the courts being reviewed.”); Motor Vehicle Cas. Co. v. Thorpe
9 Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869, 879
10 n.3 (9th Cir. 2012) (“Appellees’ contention on equitable mootness
11 is not asserted within its appellate brief, but was the subject
12 of a separate motion to dismiss the appeal as moot”).

13 Franklin does not argue that it was prejudiced or harmed by
14 the City’s raising the equitable mootness issue in the Motion to
15 Dismiss, and we do not perceive any prejudice to Franklin. As
16 requested in the last section of Franklin’s opposition, we are
17 considering the Motion to Dismiss in conjunction with our overall
18 disposition of this appeal. Franklin and the City both have
19 taken the opportunity for extensive further exposition of their
20 arguments in the papers filed in support of and in opposition to
21 the Motion to Dismiss, thus supplementing the already substantial
22 papering of this appeal through the parties’ oversized briefs.
23 And, even if we believed that the City had waived the issue, we
24 note that equitable mootness raises jurisdictional questions that
25 we have an independent duty to consider sua sponte. See, e.g.,
26 Sahagun v. Landmark Fence Co., Inc. (In re Landmark Fence Co.,
27 Inc.), 801 F.3d 1099, 1102 (9th Cir. 2015); Hunt v. Imperial
28 Merchant Servs., Inc., 560 F.3d 1137, 1141 (9th Cir. 2009),

1 quoting Demery v. Arpaio, 378 F.3d 1020, 1025 (9th Cir. 2004).

2 In these circumstances, we are not persuaded that the City
3 waived equitable mootness as an issue by raising it through the
4 Motion to Dismiss rather than in its answering brief.

5 2. Application of equitable mootness in chapter 9

6 Franklin next argues that the equitable mootness doctrine
7 should not apply to appeals in chapter 9 cases because “[i]n the
8 event of reversal of confirmation, the City always will be able
9 to provide at least some ‘fractional’ relief without unduly or
10 inequitably impairing the rights of others.” Appellants’
11 Objection to Motion to Dismiss the Appeal as Equitably Moot
12 (“Objection”), at 2. Thus, Franklin argues that equitable
13 mootness should not apply in chapter 9 appeals **as a matter of**
14 **law**, supporting its argument with **a fact-based rationale**, and
15 therein lies the rub.

16 In support of its argument, Franklin cites the opinion of
17 the district court for the Northern District of Alabama on appeal
18 in Bennett v. Jefferson County, Alabama, 518 B.R. 613 (N.D. Al.
19 2014). In Jefferson County, the court was concerned that “one of
20 the costs of finality [through application of equitable mootness]
21 is to allow a non-Article III court to decide important
22 constitutional questions that place substantial future
23 obligations on the citizens of Jefferson County without
24 representation.” Id. at 637. Undercutting its own rationale,
25 the court recognized and agreed “that some part or parts of the
26 Confirmation Order may be impossible to reverse,” but it
27 nevertheless concluded that the constitutional issues raised with
28 respect to the county’s ceding authority to set sewer rates could

1 not be cut off through the application of equitable mootness.

2 Id. Its ultimate conclusion was, "In light of the public and
3 political interests at stake in any Chapter 9 proceedings, the
4 court will deny the County's appeals to equity to allow allegedly
5 unconstitutional provisions of the Confirmation Order to stand
6 without review." Id. at 638.

7 The district court for the Eastern District of Michigan came
8 to exactly the opposite conclusion in the appeal in Darrah v.
9 City of Detroit, Michigan (In re City of Detroit, Michigan), 2015
10 WL 5697779 (E.D. Mich, S.D. Sept. 29, 2015). After surveying the
11 limited applicable authorities, the City of Detroit court
12 concluded:

13 [T]he [equitable mootness] doctrine is not concerned
14 with the specific chapter under which the debtor's case
15 was brought. Rather, what matters is whether hearing
16 the bankruptcy appeal could unravel the debtor's plan
17 and disturb the reliance interests created by it.
18 Because the underlying equitable considerations of
19 promoting finality and good faith reliance on a
20 judgment [apply] with equal force to a Chapter 9
21 bankruptcy appeal, the Court sees no reason why the
22 doctrine should not be applied to avoid disturbing a
23 Chapter 9 plan of adjustment.

24 Id. at *4. It specifically considered and rejected the
25 conclusion of the Jefferson County court.

26 [T]he interests of the City [of Detroit], its over
27 100,000 creditors, and its nearly 700,000 residents in
28 relying on a final judgment cannot be marginalized and
dismissed in the broad brush manner adopted by the
Jefferson County court. If the interests of finality
and reliance are paramount to a Chapter 11 private
business entity with investors, shareholders, and
employees, then these interests surely apply with
greater force to the City's Chapter 9 Plan, which
affects thousands of creditors and residents.

29 Id. at *5.

30 This panel and the Ninth Circuit applied equitable mootness

1 in a chapter 9 appeal in Lionel v. City of Vallejo, California
2 (In re City of Vallejo, California), 551 Fed. Appx. 339 (9th Cir.
3 Dec. 31, 2013).

4 We are persuaded by the reasoning of the court in City of
5 Detroit that equitable mootness has a legitimate role to play in
6 bankruptcy reorganization cases of all types, chapter 11, chapter
7 13 **and** chapter 9 and follow the course set in In re City of
8 Vallejo. This appeal arguably presents a paradigm case for
9 considering application of equitable mootness in a chapter 9
10 context because the constitutional and political concerns that
11 troubled the court in Jefferson County are not present: The
12 City's voters approved the sales tax increase necessary to fund
13 the Plan in advance of confirmation. Those who voted for
14 approval of the tax increase did so in reliance on the City's
15 efforts to confirm the Plan to safeguard the provision of future
16 municipal services. As the bankruptcy court noted in its Amended
17 Opinion:

18 By the time the [City's chapter 9] case was filed, the
19 City had been pared down to core functions and [had]
20 been reduced to a situation in which such essential
21 services as police and fire were being operated below
sustainable standards. The murder rate had soared.
Police responded only to crimes in progress. A wrecker
had to accompany fire engines on emergency calls.

22 Amended Opinion, at 51. Several hundred thousand residents
23 depend on the City to provide future services, including police
24 and fire protection. They have a legitimate concern for finality
25 that is served by appropriate application of equitable mootness.
26 And, we note that Franklin is raising no constitutional issues in
27 this appeal, such as bedeviled the court in Jefferson County.
28 For all of these reasons, we conclude, as a matter of law, that

1 the equitable mootness doctrine can appropriately be applied in
2 chapter 9 cases generally and in this appeal specifically.

3 3. Standards for application of equitable mootness

4 Fortunately, in considering the application of equitable
5 mootness, we benefit from the analysis in a number of recent
6 Ninth Circuit decisions. "An appeal is equitably moot if the
7 case presents 'transactions that are so complex or difficult to
8 unwind' that 'debtors, creditors, and third parties are entitled
9 to rely on [the] final bankruptcy court order.'" Mortgages I,
10 771 F.3d at 1215, quoting In re Thorpe Insulation Co., 677 F.3d
11 at 880. Accordingly, the equitable mootness doctrine focuses on
12 the reliance and finality concerns of interested parties in a
13 bankruptcy appeal, whether participating in the appeal or not.

14 "Equitable mootness occurs when a 'comprehensive change of
15 circumstances' has occurred so 'as to render it inequitable for
16 this court to consider the merits of the appeal.'" In re Thorpe
17 Insulation Co., 677 F.3d at 880, quoting Trone v. Roberts Farms,
18 Inc. (In re Roberts Farms, Inc.), 652 F.2d 793, 798 (9th Cir.
19 1981). "Unlike Article III mootness, which causes federal courts
20 to lack jurisdiction and so to have an **inability** to provide
21 relief, equitable mootness is a judge-created doctrine that
22 reflects an **unwillingness** to provide relief." JPMCC 2007-C1
23 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re
24 Transwest Resort Props., Inc.), 801 F.3d 1161, 1167 (9th Cir.
25 2015) (emphasis in original).

26 The Ninth Circuit applies a four-factor test to determine
27 whether an appeal from the order confirming a plan is equitably
28 moot:

1 [1]We will look first at whether a stay was sought, for
absent that a party has not fully pursued its rights.
2 [2]If a stay was sought and not gained, we then will
look at whether substantial consummation of the plan
3 has occurred. [3]Next, we will look to the effect a
remedy may have on third parties not before the court.
4 [4]Finally, we will look at whether the bankruptcy
court can fashion effective relief without completely
5 knocking the props out from under the plan and thereby
creating an uncontrollable situation for the bankruptcy
6 court.

7 In re Thorpe Insulation Co., 677 F.3d at 881. We examine each of
8 those four factors as follows.

9 i) Seeking a stay

10 As noted above, Franklin filed its Stay Motion after the
11 bankruptcy court orally announced its findings and conclusion
12 that the Plan would be confirmed at the Hearing but before the
13 Confirmation Order was entered. The bankruptcy court held a
14 hearing on the Stay Motion and heard argument from counsel for
15 the parties. At a hearing on January 20, 2015, the bankruptcy
16 court stated detailed oral findings on the record addressing the
17 four factors for considering a stay pending appeal as discussed
18 in Nken v. Holder, 556 U.S. 418 (2009), and determined that
19 granting the Stay Motion was not warranted. In its reply in
20 support of the Stay Motion, Franklin conceded that "if no stay is
21 issued, Franklin will not be irreparably harmed." (Emphasis in
22 original.)

23 Based on this record, whether Franklin has pursued "with
24 diligence all available remedies to obtain a stay" of the
25 Confirmation Order, In re Roberts Farms, Inc., 652 F.2d at 798,
26 is arguable, but at least, Franklin has not "flunked this first
27 step." Id.

1 ii) Substantial consummation of the Plan

2 Section 1101(2) defines "substantial consummation" as:

- 3 (A) transfer of all or substantially all of the
4 property proposed by the plan to be transferred;
5 (B) assumption by the debtor or by the successor to the
6 debtor under the plan of the business or of the
7 management of all or substantially all of the property
8 to be dealt with by the plan; and
9 (C) commencement of distribution under the plan.⁴

10 The City argues that there can be no dispute that the Plan
11 has been substantially consummated based on the following
12 actions: 1) The City has paid the \$5.1 million required to be
13 paid on Retiree Health Benefit Claims, and all but one of the
14 payment checks had been cashed by retirees. 2) The new lease and
15 assignments between Assured and the City with respect to the 400
16 E. Main property have been implemented. 3) Agreements and
17 documentation to memorialize the settlements between the City and
18 NCFG have been finalized and signed. 4) The City and Ambac have
19 executed an amended and restated stipulation and settlement
20 agreement. 5) The City executed a new agreement with the
21 California Department of Boating and Waterways. 6) The City
22 executed new agreements with two minor league sports teams. The
23 City asserts that all mandated payments and transactions to
24 implement the Plan have been completed.

25 In its Objection, Franklin admits that, "The Plan became
26 effective and was consummated in February 2015."

27 ⁴ Although § 901 does not incorporate § 1101(2) for
28 chapter 9 cases, the definition still is useful in the equitable
mootness analysis as no analogous definition is set forth in
§ 902 "Definitions for this chapter."

1 iii) The third and fourth factors

2 "The third consideration in the test for equitable mootness
3 is whether the relief sought would bear unduly on innocent third
4 parties." In re Transwest Resort Props., Inc., 801 F.3d at 1169,
5 citing In re Thorpe Insulation Co., 677 F.3d at 882; and Rev Op
6 Group v. ML Manager LLC (In re Mortgages Ltd.) ("Mortgages II"),
7 771 F.3d 623, 629 (9th Cir. 2014). In analyzing this factor, we
8 must determine "whether it is possible to [alter the Plan] in a
9 way that does not affect third party interests to such an extent
10 that the change is inequitable." In re Thorpe Insulation Co.,
11 677 F.3d at 882. "The fourth, and most important, consideration
12 . . . is whether the bankruptcy court could fashion equitable
13 relief without completely undoing the plan." In re Transwest
14 Resort Props., Inc., 801 F.3d at 1171. "Where equitable relief,
15 though incomplete, is available, the appeal is not moot." In re
16 Thorpe Insulation Co., 677 F.3d at 883.

17 The City argues that reversal of the Confirmation Order
18 would undermine the settlements that were so painstakingly
19 negotiated over a period of years with the City's labor unions,
20 CalPERS and the City's pension plan participants and retirees,
21 and the other capital markets/bond creditors, frustrating the
22 expectations of creditor constituencies not participating in this
23 appeal and not before this panel. It further would require
24 revisiting the City's Long Range Financial Plan ("LRFP"), which
25 provided substantial evidence to support the feasibility of the
26 Plan, consequently calling into question the "economic
27 underpinnings of the Plan" and, ultimately, jeopardizing the
28 City's recovery. Motion to Dismiss, at 16. In other words,

1 reversal of the Confirmation Order would unleash chaos before the
2 bankruptcy court and make the process for reconstructing a
3 confirmable plan of adjustment for the City unmanageable.

4 In its Objection, Franklin assures us that "[t]he relief
5 that Franklin seeks on appeal - greater payment from the City [on
6 its unsecured claim] - would not impact any other constituency."
7 Objection, at 12. "A fundamental premise of this appeal is that
8 the City can pay more to Franklin without altering recoveries of
9 other creditors or otherwise unraveling the Plan." Objection, at
10 1. We take Franklin at its word.

11 The Ninth Circuit has repeatedly emphasized that where a
12 creditor is appealing confirmation of a plan, but is seeking
13 "only money" (as in this appeal), it is generally not impossible
14 to provide a remedy. See, e.g., In re Transwest Resort Props.,
15 Inc., 801 F.3d at 1173 ("[W]e see no reason why, if the court
16 were to devise a remedy that required Reorganized Debtors to pay
17 Lender one dollar, for example, the plan would be undone."); In
18 re Thorpe Insulation Co., 677 F.3d at 883; Platinum Capital,
19 Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d
20 1070, 1074 (9th Cir. 2002) ("Even if the plan has been
21 substantially consummated, because Platinum's claim is only for
22 monetary damages against solvent debtors, this is not a case in
23 which it would be impossible to fashion effective relief.").

24 In its findings in support of its decision to deny the Stay
25 Motion, the bankruptcy court considered what remedies might be
26 available on remand in this case:

27 The question is, could an [appropriate] remedy be
28 fashioned that would not require reeling back in, for
example, all the payments to retirees, and I have no

1 difficulty perceiving the possibility of any number of
2 likely solutions . . . in the event of a reversal on
3 appeal. Those solutions . . . most certainly would
4 involve more money for Franklin [W]ith its
5 finances on more stable footing, it's conceivable that
6 some additional funds could be made available to
7 Franklin if the appellate court put the matter back to
8 me, and that could be done without disturbing in any
9 way the payments to retirees; that is, the payments to
10 the other unsecured creditors.

11 Hr'g Tr. Jan. 20, 2015, at 20:14-18; 21:3-8.

12 Article XII, Section 3 of the Plan provides that the
13 bankruptcy court retains and has exclusive jurisdiction "to
14 determine any and all . . . contested or litigated matters . . .
15 that are instituted by any holder of a Claim before or after the
16 Effective Date concerning any matter based upon, arising out of,
17 or relating to the Chapter 9 case" Article XII, Section
18 8 of the Plan provides that the bankruptcy court retains and has
19 exclusive jurisdiction "to consider any modifications of this
20 Plan" Article XIV, Section B of the Plan provides:

21 If any term or provision of this Plan is held by the
22 Bankruptcy Court or any other court having
23 jurisdiction, including on appeal, if applicable, to be
24 invalid, void, or unenforceable, the Bankruptcy Court,
25 in each such case at the election of and with the
26 consent of the City, shall have the power to alter and
27 interpret such term or provision to make it valid or
28 enforceable to the maximum extent practicable,
consistent with the original purpose of the term or
provision held to be invalid, void, or unenforceable,
and such term or provision shall then be applicable as
altered or interpreted. Notwithstanding any such
holding, alteration, or interpretation, the remainder
of the terms and provisions of this Plan shall remain
in full force and effect and shall in no way be
affected, impaired, or invalidated by such holding,
alteration, or interpretation.

29 Plan, at 58, 59 and 62. The confirmed Plan gives the bankruptcy
30 court all of the tools it would need on remand to consider a
31 modification to the Plan to increase payments to Franklin on its

1 unsecured claim.

2 The City argues that those provisions of the confirmed Plan
3 are subject, among other things, to § 904, which provides that,
4 “Notwithstanding any power of the court, unless the debtor [i.e.,
5 the City] consents, . . . the court may not, by any stay, order,
6 or decree, in the case or otherwise, interfere with - (1) any of
7 the political or governmental powers of the debtor; (2) any of
8 the property or revenues of the debtor; or (3) the debtor’s use
9 or enjoyment of any income-producing property.” In other words,
10 on remand, the bankruptcy court could not order the City to pay
11 any more money to Franklin without the City’s consent.

12 That is a given in light of § 904’s requirements. But § 904
13 applied throughout the process of negotiations between the City
14 and its creditors that resulted in the settlements incorporated
15 in the Plan that required the City to make multi-million dollar
16 payments to its creditors from its revenues. We do not perceive
17 that fundamental statutory limitation as precluding a remand to
18 provide equitable relief in terms of an adjustment of payments to
19 Franklin. The City could consent or not to such an adjustment(s)
20 at various points in further negotiations with Franklin as it
21 determined to be appropriate in the exercise of its sovereign
22 authority.

23 Based on our review of the record and the Motion to Dismiss,
24 the Objection and the City’s reply, we conclude that Franklin
25 attempted to obtain a stay of the Confirmation Order pending
26 appeal, but the Stay Motion was denied, and the Plan has been
27 substantially consummated. To reverse the Confirmation Order at
28 this point would have a potentially devastating impact on

1 creditor constituencies whose settlements with the City were
2 incorporated in the Plan and who are not appearing before us in
3 this appeal. Reversing the Confirmation Order would knock "the
4 props out from under the" Plan and would leave the bankruptcy
5 court with an unmanageable situation on remand. Accordingly, we
6 conclude that Franklin's appeal of the Confirmation Order
7 generally is equitably moot and must be dismissed.

8 However, we further conclude that to the extent Franklin
9 seeks through its appeal only a greater payment on its unsecured
10 claim, as it concedes in the Objection, an effective remedy is
11 theoretically possible, and that claim is not equitably moot.
12 Accordingly, we will proceed to consider the issues that Franklin
13 raises with respect to the payout on its unsecured claim.⁵

14 B. The requirement that the Plan be proposed in "good faith"

15 Section 1129(a)(3), specifically incorporated for chapter 9
16 cases in § 901(a), requires that a plan of adjustment "has been
17 proposed in good faith and not by any means forbidden by law." A
18 plan is proposed in good faith "where it achieves a result
19 consistent with the objectives and purposes of the [Bankruptcy]
20 Code." In re Sylmar Plaza, L.P., 314 F.3d at 1074, citing Ryan
21 v. Loui (In re Corey), 892 F.2d 829, 835 (9th Cir. 1989); In re
22 _____

23 ⁵ We do not consider Franklin's argument that the
24 bankruptcy court erred in its forward looking interpretation of
25 § 943(b)(3), which provides that "all amounts **to be paid** by the
26 debtor or by any person for services or expenses in the case or
27 incident to the plan have been fully disclosed and are
28 reasonable." (Emphasis added.) That issue has nothing to do
with the payment on Franklin's unsecured claim provided for in
the Plan.

1 Madison Hotel Assocs., 749 F.2d 410, 425 (7th Cir. 1994).

2 Whether the Plan was proposed in good faith is a fact finding in
3 the "totality of the circumstances" reviewed for clear error.

4 Marshall v. Marshall (In re Marshall), 721 F.3d 1032, 1046 (9th
5 Cir. 2013) (citations omitted); In re Sylmar Plaza, L.P., 314
6 F.3d at 1074; Stolrow v. Stolrow's, Inc. (In re Stolrow's, Inc.),
7 84 B.R. 167, 172 (9th Cir. BAP 1988).

8 At the outset, the record reflects that the Plan was the
9 product of extended negotiations over a period of years pre- and
10 postpetition resulting in multiple collective bargaining
11 agreements and settlements with creditor constituencies.

12 Franklin objected to confirmation on good faith grounds, arguing
13 that the Plan was not proposed in good faith based on the fact
14 that it was receiving essentially a 1% payout on its unsecured
15 claim when unsecured pension benefit claims were not being
16 altered.

17 The bankruptcy court began its good faith analysis with its
18 conclusion that Franklin's objection was based on a faulty
19 premise: The Plan had a substantial **indirect** impact on pensions
20 in that 1) employee compensation on which pension benefits were
21 calculated had been reduced; 2) the reductions in numbers of City
22 employees had a significant effect on pensions, as there were
23 "fewer people entitled to pensions in the first place;" and 3)
24 pension benefits for new City employees had been reduced, with
25 those reductions incorporated in the City's collective bargaining
26 agreements.

27 [T]he assertion that pensions are not affected by the
28 [Plan] incorrectly suggests that employees and retirees
are not sharing the pain with capital markets

1 creditors. To the contrary, the reality is that the
2 value of what employees and retirees lose under the
3 [Plan] is greater than what capital markets creditors
lose.

4 Amended Opinion, at 50. It further took "particular note" of the
5 "obviously intensive arms-length negotiations" that occurred
6 during the case over a period in excess of two years to arrive at
7 material provisions of the Plan and reflected that "significant
8 concessions have been made by virtually all of the various
9 parties in interest, not only on the labor side but also on the
10 capital market side of the equation." Hr'g Tr. Oct. 30, 2014, at
11 36:1-9.

12 The bankruptcy court also noted that "one of the features of
13 the agreements with other capital market creditors is a
14 contingent fund that is available in a number of years down the
15 Plan that is designed to provide for additional payment if the
16 finances of the City prosper and . . . more than 20 percent of
17 that was reserved for Franklin Funds if it wished to take
18 advantage of it **before the time of confirmation**. It elected not
19 to do that" Id. at 36:13-20 (emphasis added). Based on
20 those findings, the bankruptcy court found that the Plan had been
21 proposed in good faith and not by any means forbidden by law.

22 On appeal, Franklin argues that the treatment of its
23 unsecured claim was unfairly discriminatory, and the City
24 gerrymandered the Class 12 general unsecured class to minimize
25 Franklin's vote against confirmation of the Plan. Section
26 1122(a) provides that "a plan may place a claim . . . in a
27 particular class only if such claim is substantially similar to
28 the other claims . . . of such class." Franklin's general

1 unsecured claim was placed in the class of general unsecured
2 claims, Class 12, consistent with the plain language of
3 § 1122(a), and the treatment of its claim was the same as the
4 treatment of the claims of all other creditors in Class 12. The
5 Ninth Circuit has concluded that, “[T]he fact that a debtor
6 proposes a plan in which it avails itself of an applicable
7 [Bankruptcy] Code provision does not constitute evidence of bad
8 faith.” In re Sylmar Plaza, L.P., 314 F.3d at 1075, quoting In
9 re PPI Enter. (U.S.), Inc., 228 B.R. 339, 347 (Bankr. D. Del.
10 1998).

11 Mindful that we must affirm the bankruptcy court’s fact
12 findings so long as any support for those findings can be found
13 in inferences that can be drawn from the record, we conclude that
14 the bankruptcy court did not clearly err in its finding that the
15 Plan was proposed in good faith and not by any means forbidden by
16 law.

17 C. Classification of claims

18 As noted above, § 1122(a) provides that claims can only be
19 included in a particular class in a reorganization plan if they
20 are “substantially similar” to the claims of other class members.
21 Section 1123(a)(4) provides that the treatment for each claim in
22 a particular class under a reorganization plan must be the same
23 “unless the holder of a particular . . . claim agrees to a less
24 favorable treatment.” As with § 1129(a)(3), § 901(a)
25 specifically incorporates §§ 1122 and 1123(a)(4) for chapter 9
26 cases. “The bankruptcy court’s finding that a claim is or is not
27 substantially similar to other claims, constitutes a finding of
28 fact reviewable under the clearly erroneous standard.” Barakat

1 v. Life Ins. Co. (In re Barakat), 99 F.3d 1520, 1523 (9th Cir.
2 1996), citing Steelcase Inc. v. Johnston (In re Johnston), 21
3 F.3d 323, 327 (9th Cir. 1994).

4 Franklin's argument with respect to classification of its
5 unsecured claim starts from the proposition that a plan proponent
6 does not have unfettered discretion to classify similar claims
7 separately, recognizing that equality of treatment among like-
8 situated creditors is one of the primary objectives of the
9 Bankruptcy Code. See Begier v. Internal Revenue Service, 496
10 U.S. 53, 58 (1990) ("Equality of distribution among creditors is
11 a central policy of the Bankruptcy Code. According to that
12 policy, creditors of equal priority should receive pro rata
13 shares of the debtor's property."). Franklin cites to us
14 authorities finding error in the **separate** classification of
15 claims with similar liquidation priorities. See, e.g., In re
16 Barakat, 99 F.3d at 1526; Phoenix Mutual Life Ins. Co. v.
17 Greystone III Joint Venture (In re Greystone III Joint Venture),
18 995 F.2d 1274, 1279 (5th Cir. 1992) ("[T]hou shalt not classify
19 similar claims differently in order to gerrymander an affirmative
20 vote on a reorganization plan."); Oxford Life Ins. Co. v. Tucson
21 Self-Storage, Inc. (In re Tucson Self-Storage, Inc.), 166 B.R.
22 892, 898 (9th Cir. BAP 1994). However, what Franklin finds
23 objectionable in this case is that its unsecured claim was **not**
24 separately classified but instead was included in a class of
25 general unsecured creditors where it was out-voted.

26 Contrary to Franklin's argument that the bankruptcy court
27 "disregarded statutory protections" (Appellants' Opening Brief,
28 at 1), the bankruptcy court began its analysis of Franklin's

1 classification issues by quoting the language of § 1122(a). Hr'g
2 Tr. Oct. 30, 2014, at 31:11-13. "Generally, § 1122 allows plan
3 proponents broad discretion to classify claims and interests
4 according to the particular facts and circumstances of each
5 case." In re City of Colo. Springs Spring Creek Gen. Improvement
6 Dist., 187 B.R. 683, 687 (Bankr. D. Colo. 1995).

7 The bankruptcy court found that the capital markets/bond
8 claims were all separately classified, and "that's appropriate
9 because each one has its own unique legal rights and status."
10 Hr'g Tr. Oct. 30, 2014, at 31:14-15. Franklin characterizes the
11 unsecured claims of other capital markets/bond creditors as
12 "similarly situated" (Appellants' Opening Brief, at 64-65), but
13 its argument glosses over the facts that Assured, NCFG and Ambac
14 all had different collateral securing at least parts of the
15 City's respective obligations to them, and the City ultimately
16 entered into global settlements with all three. "[A]s a general
17 rule each holder of an allowed claim secured by a security
18 interest in specific property of the debtor should be placed in a
19 separate class." 7 Collier on Bankruptcy ¶ 1122.03[3][c] (Alan
20 N. Resnick & Henry J. Sommer eds., 16th ed.). By settling with
21 the capital markets/bond creditors other than Franklin, the City
22 avoided a number of potentially protracted, expensive and risky
23 valuation proceedings with respect to City properties that
24 presented problematic valuation issues, including the Stewart
25 Eberhardt Building, the City's main police station, two fire
26 stations and a library branch. Through a combination of
27 different disposition arrangements for their collateral and
28 different payment terms for the secured and unsecured portions of

1 the City's debts to each bond creditor, including different
2 percentage recoveries, separate classification of the bond
3 creditor claims made legitimate business and economic sense. See
4 In re Barakat, 99 F.3d at 1526. The bankruptcy court did not
5 clearly err in so finding.

6 The bankruptcy court further found that general unsecured
7 claims, including not only the Retiree Health Benefit Claims and
8 Franklin's unsecured claim but also leave buyout claims, the
9 claim of Michael A. Cobb and other miscellaneous unsecured
10 claims, "were all in the same spot" and were properly included in
11 Class 12.⁶ Franklin grudgingly admits that "the Plan's treatment
12 of Class 12 claims superficially is the same [for all class
13 members] - a meager payment of less than one penny on the
14 dollar," but argues that treatment of Retiree Health Benefit
15 Claims under Class 12 cannot be analyzed separately from the
16 treatment of CalPERS and pension plan participants (unimpaired,
17 100% payment) in Class 15. We disagree for the following

18
19 ⁶ Franklin argues that because its unsecured claim could
20 have been paid "at least in part from restricted PFF's," its
21 unsecured claim is not "substantially similar" to the Retiree
22 Health Benefit Claims for § 1122(a) purposes. "PFF's" are
23 charges levied on new developments to defray a portion of
24 infrastructure expenses. See Cal. Gov't Code §§ 66000 et seq.
25 While the City potentially could have used PFF's to pay debt
26 service to Franklin, it had no **legal** obligation to use PFF's to
27 pay Franklin, which Franklin does not contest. Accordingly,
28 Franklin's citations to Wells Fargo Bank, N.A. v. Loop 76, LLC
(In re Loop 76, LLC), 465 B.R. 525 (9th Cir. BAP 2012) (where the
subject creditor had a third party guarantee source of recovery
for its unsecured claim), and Steelcase, Inc. v. Johnston (In re
Johnston), 140 B.R. 526 (9th Cir. BAP 1992) (where the subject
creditor had a secured claim against the assets of another entity
to pay its unsecured claim in the debtor's case), are inapposite.

1 reasons.

2 First, the group of Retiree Health Benefit Claimants and the
3 entire group of the city's pension plan participants are not the
4 same. The 1,100 fully retired City employees with Retiree Health
5 Benefit Claims were represented in the City's chapter 9 case by
6 the Official Committee of Retirees. Current City employees were
7 represented by their respective unions to negotiate or
8 renegotiate collective bargaining agreements. CalPERS
9 administered the City's pension plans. While the interests of
10 all of these parties converged with respect to the treatment of
11 the City's pensions, the group with Retiree Health Benefit Claims
12 in Class 12 was not congruent with the larger group of claimants
13 in Class 15.

14 Second, while the City's obligations to 1) pay its current
15 employees; 2) provide health care benefits to current and retired
16 employees; and 3) provide pension benefits to its current and
17 retired employees may have arisen under the same contracts, the
18 Plan negotiations dealt with all such issues on related but
19 separate tracks. In considering Franklin's objections to Plan
20 confirmation based on the difference between the treatment of its
21 unsecured claim and the treatment of pension benefits, the
22 bankruptcy court made the following findings:

23 I know that in those collective bargaining agreements
24 there were considerable changes and concessions that
25 the unions made regarding compensation and conditions
26 of employment in terms of matters relating to
27 retirement. There was a new retirement plan agreed to
28 for new employees. There was - the employees' portion,
the contributions to retirement plans which the City
had previously been picking up and paying in excess of
six percent, was shifted back to the employees.

Hr'g Tr. Oct. 30, 2014, at 13:18-25.

1 One of the major financial problems of the City was the
2 Retiree Health Plan. The City's plan beforehand was a
3 "pay as you go" plan, in which the City paid 100
4 percent of health benefits for retirees and their
5 dependents. This, through the years, started to
6 hemorrhage funds. The City imposed right at the outset
7 of the case a new Retiree Health Plan that came in . .
8 . several segments, but the net result is that there is
9 now a much less generous Retiree Health Plan, and the
10 retirees are required to contribute funds to pay a
11 portion of the expense of that plan.

12 Id., at 14:12-21.

13 [T]he City has declined to reject the [CalPERS]
14 contract, saying it exercises its business judgment to
15 conclude that the pension contract - that CalPERS is,
16 in effect, the low cost provider of the City's
17 pensions, and that it would, under any theory, cost
18 more to use some other pension provider

19 Id., at 18:10-15.

20 I have collective bargaining agreements that cover most
21 of the employees that have been hammered out in part
22 through this - well, hammered out over time and then
23 reworked as part of this Chapter 9 case, and it has
24 been made clear that the negotiations in those
25 particular contractual negotiations were on a basis of
26 the employees and their representatives saying, all
27 right, we will give up certain aspects of our basic
28 compensation, but we do not want any of the pensions
touched. So all of the concessions that were made -
and there are quite substantial concessions - were made
on the income side, the direct income side, not on the
pension side.

29 Id., at 21:11-22.

30 Consistent with those findings, the record reflects that the
31 City had to take into account a number of legitimate business and
32 economic considerations in negotiating the differential Plan
33 arrangements for dealing with pensions, employee compensation and
34 health care benefits for its current employees and retirees.
35 Based on those considerations, we conclude that the bankruptcy
36 court did not clearly err in finding that the Plan satisfied the
37 requirements of § 1122(a) in its classification scheme.
38

1 Within Class 12 itself, all creditors received the same
2 percentage payout on their allowed unsecured claims as \$5,100,000
3 represented to the allowed aggregate amount of the Retiree Health
4 Benefit Claims. The bankruptcy court found that "there is equal
5 treatment with respect to all of the claims that are general
6 unsecured claims" included in Class 12 and accordingly concluded
7 that the requirements of § 1123(a)(4) had been satisfied. Again,
8 we perceive no clear error in the fact findings that supported
9 that conclusion.

10 The bankruptcy court noted Franklin's contrary vote but
11 found that the general unsecured creditor class, Class 12, voted
12 in favor of the Plan. Franklin is merely a dissenting creditor
13 in the accepting class of general unsecured creditors. In these
14 circumstances, "cramdown" analysis under § 1129(b) is not
15 required, and we do not consider further Franklin's "unfair
16 discrimination" argument based on § 1129(b). See, e.g., In re
17 City of Colo. Springs Spring Creek Gen. Improvement Dist., 187
18 B.R. at 690.

19 D. Best interests of creditors

20 Franklin argues that the bankruptcy court misapplied the
21 "best interests of creditors" test in this case because it
22 applied that test collectively, rather than individually and
23 particularly with respect to Franklin's unsecured claim.
24 Analyzing this issue requires consideration of the differences
25 between chapters 9 and 11, both in terms of specific Bankruptcy
26 Code provisions and the very different nature of the entities
27 that seek to reorganize their affairs under each chapter.

28 Section 1129(a)(7)(A)(ii) provides that

1 With respect to each impaired class of claims

2 (A) **each holder of a claim . . . of such class -**

3 (ii) will receive . . . under the plan on account of
4 such claim . . . property of a value, as of the
5 effective date of the plan, that is not less than the
6 amount that such holder would so receive . . . if the
7 debtor were liquidated under chapter 7 of this title on
8 such date.⁷

9 (Emphasis added.) Under § 901, § 1129(a)(7) does not apply to
10 chapter 9 cases. Instead, chapter 9 includes its own "best
11 interests" test in § 943(b)(7): "The court shall confirm the plan
12 if - (7) the plan is **in the best interests of creditors** and is
13 feasible." (Emphasis added.)

14 By their terms, the "best interests" tests in chapters 9 and
15 11 are different, and only in chapter 11 is particular
16 consideration of the best interests of individual creditors
17 specified. By its terms, the "best interests" test in chapter 9
18 is collective rather than individualized, and that interpretation
19 is supported by the very context of chapter 9.

20 Franklin cites two decisions of the Supreme Court, American
21 United Mutual Life Ins. Co. v. City of Avon Park, Florida, 311
22 U.S. 138 (1940), and Kelley v. Everglades Drainage Dist., 319
23 U.S. 415 (1943), and one Ninth Circuit decision, Fano v. Newport
24 Heights Irr. Dist., 114 F.2d 563 (9th Cir. 1940), under the
25 former Bankruptcy Act in support of its "best interests of

26 ⁷ Although this chapter 11 provision does not contain the
27 phrase "best interests of creditors," it is colloquially known as
28 the "best interests" test. See, e.g., Bank of Am. Nat'l Tr. &
Sav. Assn. v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 441 n.13
(1999); Sec. Farms v. Gen. Teamsters, Warehousemen & Helpers
Union, Local 890 (In re Gen. Teamsters, Warehousemen & Helpers
Union, Local 890), 265 F.3d 869, 877 (9th Cir. 2001).

1 creditors" arguments. The relevant provision of the Bankruptcy
2 Act, § 83(e), 11 U.S.C. § 403(e), provided that a required
3 finding to support the approval of a plan of composition for a
4 municipal authority was that the plan was "fair, equitable, and
5 for the best interests of the creditors and does not discriminate
6 unfairly **in favor of any creditor** or class of creditors."

7 (Emphasis added.) In other words, § 83(e) of the Bankruptcy Act
8 included a provision which, by its terms, protected the rights of
9 individual creditors, i.e., the prohibition against unfair
10 discrimination "in favor of any creditor" But this does
11 not mean that all of the provisions of § 83(e) protected
12 individual creditors rather than creditors collectively. None of
13 the cited Bankruptcy Act decisions held that the "best interests"
14 test under the Bankruptcy Act protected individual creditor
15 rights.

16 The Supreme Court did state in Avon Park that, "The fact
17 that the vast majority of security holders may have approved a
18 plan is not the test of whether that plan satisfies the statutory
19 standard. The former is not the substitute for the latter. They
20 are independent." 311 U.S. at 148. However, that principle is
21 reflected in the separate requirements in chapter 9 of the
22 Bankruptcy Code with respect to class voting and acceptance in
23 §§ 1126(c) and 1129(a)(8), both incorporated under § 901(a), and
24 the "best interests of creditors" test in § 943(b)(7).

25 The concerns that caused the Supreme Court to grant
26 certiorari in Avon Park regarding administration of the municipal
27 reorganization process in light of the city's fiscal agent
28 participating as a creditor in the case and purchasing other

1 creditors' claims at a discount to insure the required majority
2 votes for approval of the plan are not present in this case. The
3 "best interests of creditors" test is neither discussed nor
4 analyzed in Avon Park.

5 Kelley was decided per curiam based on the Supreme Court's
6 determination that inadequate findings supported approval of the
7 subject plan. In Fano, the Ninth Circuit concluded that the
8 district court clearly erred in determining that the irrigation
9 district was insolvent "in the bankruptcy sense." Fano, 114 F.2d
10 at 565-66. We do not find any of the decisions in Avon Park,
11 Kelley or Fano dispositive or particularly persuasive in
12 resolving the "best interests of creditors" questions presented
13 in this appeal.

14 As noted by the bankruptcy court in its oral findings,
15 applying the chapter 11 concept of "best interests" in chapter 9
16 is problematic "because it goes without saying that a
17 municipality cannot be liquidated." Hr'g Tr. Oct. 30, 2014, at
18 40:20-21. Franklin recognizes in its reply brief that "a city
19 cannot go out of business" but argues that the Plan betrayed the
20 purpose of a chapter 9 plan of adjustment "to preserve the
21 municipality so that it can generate revenues for future services
22 **and** payment of creditor claims." Appellants' Reply Brief, at 10
23 (emphasis in original).

24 The bankruptcy court's determination that the Plan satisfied
25 the "best interests of creditors" test is a finding of fact that
26 is reviewed for clear error. United States v. Arnold and Baker
27 Farms (In re Arnold and Baker Farms), 177 B.R. 648, 653 (9th Cir.
28 BAP 1994), citing Kane v. Johns-Manville Corp., 843 F.2d 636, 649

1 (2d Cir. 1988).

2 Recognizing that “[a] municipality cannot be liquidated, its
3 assets sold, and the proceeds used to pay its creditors,” Collier
4 suggests the “best interests of creditors” test in chapter 9
5 “should be interpreted to mean that the plan must be better than
6 the alternative the creditors have. . . . Creditors cannot
7 expect that all excess cash go to the payment of their claims.
8 The debtor must retain sufficient funds with which to operate and
9 to make necessary improvements in and to maintain its facilities.
10 [Courts] must apply the test to require reasonable effort by the
11 municipal debtor that is a better alternative to its creditors
12 than dismissal of the case.” 6 Collier on Bankruptcy ¶
13 943.03[7][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.),
14 citing In re City of Detroit, Michigan, Case No. 13-53846, “Oral
15 Opinion on the Record,” at 22-25 (Bankr. E.D. Mich. Nov. 7,
16 2014). The bankruptcy court in the City of Detroit case
17 similarly described the chapter 9 “best interests of creditors”
18 standard in its written opinion on confirmation issues: “Courts
19 generally agree that the best interests of creditors test in
20 § 943(b)(7) requires ‘that a proposed plan provide a better
21 alternative for creditors than what they already have.’” In re
22 City of Detroit, 524 B.R. 147, 213 (Bankr. E.D. Mich. 2014),
23 quoting In re Pierce County Housing Auth., 414 B.R. 702, 718
24 (Bankr. W.D. Wa. 2009), and In re Mount Carbon Metro. Dist., 242
25 B.R. 18, 34 (Bankr. D. Colo. 1999). As noted by the bankruptcy
26 court in In re Mount Carbon Metro. Dist.:

27 This is often easy to establish. Since creditors
28 cannot propose a plan; cannot convert to Chapter 7;
cannot have a trustee appointed; and cannot force sale

1 of municipal assets under state law, their only
2 alternative to a debtor's plan is dismissal.

3 242 B.R. at 34.

4 In this case, the bankruptcy court clearly wrestled with
5 these concepts in its oral findings at the Hearing:

6 The case law that is involved says, in effect, that
7 [the Plan] must be the best possible plan under the
8 circumstances and must be doing the best that is
9 available under the circumstances. So I have looked
10 long and hard at the history of this case and the
11 responses that have been made and considered the
12 alternatives, including the alternative of putting the
13 whole situation back to square one, which is what would
14 be required [if confirmation of the Plan were denied],
and . . . running up many more millions of dollars in
terms of expenses for the City for what I view as
probably not likely very much difference, and that's
because this Plan, I'm persuaded, is about the best
that can be done - or is the best that can be done in
terms of the restructuring and adjustments of the debts
of the City

15 Hr'g Tr. Oct. 30, 2014, at 40:24-25; 41:1-11. Accordingly, the
16 bankruptcy court concluded that the "best interests of creditors"
17 test in § 943(b)(7) was satisfied.

18 Franklin argues that the bankruptcy court erred in its "best
19 interests" determination essentially on two grounds. First,
20 Franklin argues, how can the Plan serve the "best interests of
21 creditors" when it receives an approximate 1% distribution on its
22 unsecured claim and other creditors receive higher percentages on
23 their claims? Franklin's argument ignores the 100% payout it
24 received on its allowed secured claim on the effective date of
25 the Plan and the approximately \$2 million distribution it is
26 entitled to receive from the Reserve Fund held by its bond
27 indenture trustee. The bottom line is Franklin received the same
28 payment treatment on its unsecured claim afforded to all of the

1 other general unsecured claimants in Class 12. The bankruptcy
2 court found that Franklin's "17.5 percent overall return is not
3 so paltry or unfair as to undermine the legitimacy of
4 classification in the [Plan] or the good faith of the plan
5 proponent." Amended Opinion, at 54. Franklin's complaints
6 about the asserted better treatment afforded to creditors in
7 other classes under the Plan invite us to make the apples to
8 oranges to lemons to kumquats comparisons of Franklin's treatment
9 to the treatments of creditors with widely varying security
10 interests and settlement arrangements with the City. We decline
11 the invitation.

12 Second, Franklin complains about implications from the
13 evidence presented to the bankruptcy court in terms of future
14 projections as to the City's evolving financial situation,
15 focusing on the LTFP. In particular, Franklin questions the
16 necessity for subsidies for "entertainment venues" and the
17 enhanced reserves under the LTFP "for the proverbial 'rainy day'
18 or 'prolonged downturn.'" Appellants' Reply Brief, at 13-14.
19 "The [LTFP] increases the City's general fund cash reserve from
20 its 5% historical average and 10% official policy to 16.67% of
21 its budgeted annual expenses and then layers on a duplicative \$2
22 million annual 'contingency.'" Id. at 14. Of course, the City's
23 pre- and postpetition history, as reflected in the record in this
24 case, confirms that whatever historical or aspirational reserves
25 the City maintained in past budgets were not enough to protect
26 the City from the fiscal ravages it experienced since the
27 inception of the recession in 2007.

28 Ultimately, the question as to whether the Plan was the

1 "best" available proposal for the City to pay its creditors while
2 maintaining its capacity over time to provide essential services
3 to its citizens as opposed to any alternative, including
4 dismissal of the chapter 9 case, was a factual finding for the
5 bankruptcy court to make in light of the evidence before it. The
6 bankruptcy court, after considering the evidence presented by the
7 City and Franklin, determined that the Plan before it was "the
8 best that can be done." We conclude that the "best interests"
9 test in chapter 9 considers the collective interests of all
10 concerned creditors in a municipal plan of adjustment rather than
11 focusing on the claims of individual creditors. In light of that
12 conclusion, we do not perceive any clear error in the bankruptcy
13 court's determination that the City satisfied the "best interests
14 of creditors" test under § 943(b)(7).

15 E. Not discounting Retiree Health Benefit Claims to present
16 value

17 Franklin asserts that the bankruptcy court erred in not
18 discounting the Retiree Health Benefit Claims in Class 12 to
19 present value. The City argued that the Retiree Health Benefit
20 Claims should be allowed in the aggregate amount of \$545 million,
21 as determined by the Segal Company ("Segal"), "a nationally-
22 recognized actuarial and consulting firm with expertise in public
23 sector benefits." Appellee's Brief, at 17. Franklin argues that
24 Segal arrived at that number postpetition by "changing its
25 methodology during the bankruptcy case only because the City
26 instructed it to do so." Appellants' Reply Brief, at 35.
27 Franklin has advocated for an aggregate amount for the Retiree
28 Health Benefit Claims of \$261.9 million, based again on Segal's

1 calculations and included in the City's audited financial
2 statements.⁸

3 At the Hearing, the bankruptcy court determined the amount
4 of the Retiree Health Benefit Claims as \$545 million but stated,
5 "[i]t's fair game for a Rule 52(b) Motion to try to get me to
6 adjust that number." Hr'g Tr. Oct. 30, 2014, at 47: 22-24.

7 Franklin accordingly filed the Motion to Amend Findings that the
8 bankruptcy court addressed at its hearing on December 10, 2014.

9 At the hearing, the bankruptcy court first noted that the
10 amount to be paid to the retiree health benefit claimants under
11 the Plan was fixed and that no objection to the Retiree Health
12 Benefit Claims had been made, so they were deemed allowed. It
13 further noted that even if it accepted the \$261.9 million number
14 suggested by Franklin, Class 12 acceptance of the Plan would not
15 be altered.

16 In analyzing the discounting issue, the bankruptcy court
17 characterized the Retiree Health Benefit Claims as "an entirely
18 unfunded benefit" because there were no funds available to pay
19 them. It recognized that in applying a discount rate, "the lower
20 the discount rate, the bigger the claim" and that determining an
21 appropriate discount rate was a matter of much debate among
22 economists. However, in reviewing case authorities and the
23 language of § 502 "in the context of Chapter 9," the bankruptcy
24

25
26 ⁸ We have done the math. Substituting \$261.9 million for
27 \$545 million as the allowed aggregate of Retiree Health Benefit
28 Claims would increase Franklin's distribution on its Class 12
unsecured claim from approximately \$285,000 (0.93578%) to
approximately \$593,540 (1.9473%).

1 court concluded that the Bankruptcy Code did not require it to
2 discount the Retiree Health Benefit Claims to present value.
3 Accordingly, it denied the Motion to Amend Findings and stood pat
4 with its finding that the aggregate amount of the Retiree Health
5 Benefit Claims was \$545 million.

6 Section 502(b) provides that if an objection to a claim is
7 made, "the [bankruptcy] court shall determine the amount of such
8 claim . . . as of the date of the filing of the petition
9" ⁹ The question for us to determine is, did the
10 bankruptcy court err **as a matter of law** in interpreting § 502(b)
11 as not requiring it to discount the Retiree Health Benefit Claims
12 to present value?

13 Franklin cites a number of decisions in support of its
14 argument that § 502(b) plainly requires that claims with future
15 payouts, like the Retiree Health Benefit Claims, be discounted to
16 present value. See, e.g., Pension Benefit Guar. Corp. v.
17 Belfance (In re CSC Indus., Inc.), 232 F.3d 505 (6th Cir. 2000);
18 Pension Benefit Guar. Corp. v. CF&I Fabricators of Utah, Inc. (In
19 re CF&I Fabricators of Utah, Inc.), 150 F.3d 1293 (10th Cir.
20 1998); Gas Power Machinery Co. V. Wisconsin Trust Co. (In re

21 _____
22 ⁹ Technically, Franklin objected to the amount of the
23 Retiree Health Benefit Claims proposed by the City, rather than
24 directly to any claims filed by Retiree Health Benefit Claimants.
25 However, at the Hearing, counsel for the City advised the
26 bankruptcy court that Franklin, the City and the Official
27 Committee of Retirees had agreed that "rather than force Franklin
28 to file 1100 objections to claim, [the issue] would be handled as
a matter of pure law as part of the confirmation process." Hr'g
Tr. Oct. 30, 2014, at 46:14-16. We are comfortable in these
circumstances that § 502(b) applies.

1 Wisconsin Engine Co.), 234 F. 281 (7th Cir. 1916) (pre-Bankruptcy
2 Code decision); Pereira v. Nelson (In re Trace Int'l Holdings,
3 Inc.), 284 B.R. 32 (Bankr. S.D.N.Y. 2002); In re Loewen Group
4 Int'l, Inc., 274 B.R. 427 (Bankr. D. Del. 2002); Kucin v. Devan,
5 251 B.R. 269 (D. Md. 2000); In re Thomson McKinnon Sec., Inc.,
6 149 B.R. 61 (Bankr. S.D.N.Y. 1992); LTV Corp. v. Pension Benefit
7 Guar. Corp. (In re Chateaugay Corp.), 115 B.R. 760 (Bankr.
8 S.D.N.Y. 1990); and In re O.P.M. Leasing Serv., Inc., 79 B.R. 161
9 (S.D.N.Y. 1987).

10 The City counters that some of the authorities cited by
11 Franklin (In re CSC Indus., Inc., CF&I Fabricators of Utah, Inc.,
12 and In re Chateaugay Corp.) are neither helpful nor persuasive
13 because they involve ERISA claims, and "ERISA, unlike the
14 Bankruptcy Code, explicitly requires discounting to present
15 value." Appellee's Brief, at 96. Some of the authorities
16 Franklin cites are no longer viable, i.e., In re Loewen Group
17 Int'l, Inc. (overruled); In re Chateaugay Corp. (vacated). In
18 addition, the City argues that Franklin and many of the
19 authorities it cites ignore the distinction in the Bankruptcy
20 Code that where a present value determination is required, the
21 term "value" rather than "amount" is used. See, e.g.,
22 §§ 1129(a)(7), (9) and (15); 1129(b)(2); 1173(a)(2); 1225(a)(4)
23 and (5); 1325(a)(4) and (5); and 1328(b)(2). Congress' use of
24 the different term "amount" in § 502(b) does not entail a
25 discount to present value overlay.

26 Both parties cite the decision of the Third Circuit in In re
27 Oakwood Homes Corp., 449 F.3d 588 (3d Cir. 2006), in support of
28 their arguments. In Oakwood Homes, the question presented was

1 whether the bankruptcy court properly discounted the principal
2 amounts of promissory note claims to present value after it
3 already had discounted the claims for unmatured interest, as
4 provided for in § 502(b)(2). The Third Circuit held that such
5 further discounting was not appropriate based on its
6 interpretation of the language of § 502(b):

7 Stated simply, 11 U.S.C. § 502(b) speaks in terms of
8 determining the "amount" of a claim "as of" the
9 petition date. However, given that the remainder of
10 the Bankruptcy Code uses the term "value, as of" to
11 signify discounting to present value, and "amount" and
12 "value" are not synonymous, we cannot say that § 502(b)
13 clearly and unambiguously requires discounting to
14 present value in all situations.

12 Id. at 595. The Third Circuit noted that neither "amount" nor
13 "value" are defined in the Bankruptcy Code and focused on
14 appellee's concession at oral argument that those terms do not
15 "mean the same thing." Id. at 597.

16 "Amount" is defined by one dictionary as "the total
17 number or quantity; a principal sum and the interest on
18 it." Webster's Third New Int'l Dictionary (unabr.
19 1965). "Value," in contrast, is defined as "the
20 monetary worth or price of something; the amount of
21 goods, services, or money that something will command
22 in an exchange." Black's Law Dictionary (8th ed.
23 2004).

21 Id. at 597 n.8. But, "[w]here the [Bankruptcy] Code speaks of
22 discounting cash streams to present value, it speaks in terms of
23 'value, as of' a certain date. It does not use 'amount . . . as
24 of.'" Id. at 598. The Third Circuit ultimately concluded,
25 "Viewing the Bankruptcy Code holistically, we cannot say that the
26 language of 11 U.S.C. § 502(b) clearly and unambiguously requires
27 the same discounting to present value as is required in other
28 sections of the [Bankruptcy] Code." Id.

1 We realize from the cases cited to us that there is a line
2 of authority to the effect that if an interested party objects to
3 a claim, the bankruptcy court is to determine the amount of the
4 claim "as of the petition date," and, accordingly, "[a]ny portion
5 of the claim that is unmatured as of the petition date must,
6 therefore, be discounted to its value as of the petition date."
7 In re Trace Int'l Holdings, Inc., 284 B.R. at 38. See, e.g., In
8 re O.P.M. Leasing Serv., Inc., 79 B.R. at 164-65. However,
9 contrary authority also exists that interprets § 502(b)'s
10 requirement that the amount of a claim be determined "as of the
11 date of the filing of the petition" as making clear that § 502
12 only applies to prepetition claims. See 4 Collier on Bankruptcy
13 ¶ 502.03[1][b] (Alan N. Resnick and Henry J. Sommer eds., 16th
14 ed.).

15 We are persuaded by the Third Circuit's careful analysis and
16 interpretation of § 502(b) in Oakwood Homes and conclude that the
17 bankruptcy court did not err as a matter of law in determining
18 that the Bankruptcy Code did not require it to discount the
19 Retiree Health Benefit Claims to present value.

20 **CONCLUSION**

21 For the foregoing reasons, we DISMISS Franklin's appeal of
22 the Confirmation Order generally as equitably moot and otherwise
23 AFFIRM the bankruptcy court's decisions with respect to the
24 treatment of Franklin's unsecured claim under the Plan.
25
26
27
28